Supreme Court, U.S.
FILED

961448 JAN 13 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

F. Gregg Bemis, Jr.,
Petitioner
v.
The RMS LUSITANIA, etc.,
in rem,
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard T. Robol
Counsel of Record
Huff, Poole & Mahoney
4785 Columbus Street
Virginia Beach, Virginia
23462-6749
(757) 499-1841

61PP

QUESTION PRESENTED

May federal courts continue to apply the presumption of unity of property interests in the defendant *res* in admiralty proceedings *in rem*?

LIST OF PARTIES

The parties to the proceeding below were the petitioner F. Gregg Bemis, Jr. and the respondent RMS *Lusitania.*

The petitioner Bemis is a resident of Santa Fe, New Mexico. He was the Plaintiff in the district court proceedings and the Appellant before the United States Court of Appeals for the Fourth Circuit.

The respondent RMS *Lusitania* is an historic shipwreck. It was the *in rem* defendant in the district court, and the Appellee before the United States Court of Appeals for the Fourth Circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

LIST OF PARTIES..... ii

TABLE OF AUTHORITIES..... iii

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED..... 2

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT..... 13

TABLE OF CONTENTS—Continued

Page

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE ADMIRALTY PRESUMPTION REGARDING THE UNITY OF PROPERTY INTERESTS *IN REM* PROCEEDINGS..... 14

A. The Federal Circuits Are in Direct and Irreconcilable Conflict As to the Presumption of Unity of Property Interests in a Defendant Res 14

B. This Is an Appropriate Case in Which to Resolve the Conflict and Provide Guidance on the Presumption in Admiralty Proceedings *In Rem*..... 19

C. The Court Should Consolidate Consideration of this Matter With the Petition Filed by the State of California in *Deep Sea Research, Inc. v. The Brother Johnathan*..... 20

TABLE OF CONTENTS--Continued

Page

II. NEW ADVANCES IN MARINE TECHNNOLOGY HAVE MULTIPLIED CONFLICTS OVER PROPERTY INTERESTS IN ADMIRALTY PROCEEDINGS *IN REM*, REQURING THIS COURT'S EXERCISE OF ITS CONSTITUTIONAL ROLE IN FASHIONING THE DEVELOPMENT OF MARITIME AND INTERNATIONAL LAW..... 21

III. THE COURT OF APPEALS' APPROACH WILL CONTINUE TO SPAWN CONFUSION IN THE LAW GOVERNING PUBLIC ADMINISTRATION OF *IN REM* PROCEEDINGS AND HISTORIC SHIPWRECKS 25

CONCLUSION..... 28

TABLE OF CONTENTS–Continued

Page

APPENDICES:

Opinion of the United States Court of Appeals for the Fourth Circuit Filed September 17, 1996..... 1a

Amended Judgment of the United States District Court for the Eastern District of Virginia Dated May 3, 1995..... 17a

Order of the United States Court of Appeals for the Fourth Circuit Filed October 16, 1996 ..... 20a

TABLE OF AUTHORITIES

Page

CASES

Columbus-America Discovery Group v. Atlantic Mutual Insurance, et al., 974 F.2d 450 (4th Cir. 1992) 15, 18

Deep Sea Research, Inc. v. The Brother Jonathan, et al., 89 F. 3d 680 (9th Cir. 1996) 14,15, 20,22, 27

Miles v. Apex Marine Corp, 111 S. Ct. 317 (1990) 20

Moragne v. States Marine Lines, Inc. 398 U.S. 375, 401 (1970) 20

Rounds v. Cloverport Foundary & Machine Co.,237 U.S. 303 (1915) 17

Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959) 21

The Mary, 13 U.S. (9 Cranch) 126 (1815) 16

TABLE OF AUTHORITIES--Continued

Page

Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,
640 F.2d 560(5th Cir. 1981)..... 20

CONSTITUTION, STATUTES AND LEGISLATIVE MATERIALS

U.S. Const. art. III, § 2, cl. 1..... 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1333..... 20

43 U.S.C. §§ 2101-2106
(1988).....15, 25, 26

H.R. Rep. No. 514(I), 100th Cong.,
2d Sess. 1 (1988), *reprinted in*
1988 U.S.C.C.A.N. 365..... 25, 27

TABLE OF AUTHORITIES–Continued

Page

U.S. Congress, Office of Technology, *Technologies For Underwater Archaeology And Maritime Preservation–Background Paper,* OTA-BP-E-37 (1987)..... 22

Rule C, Fed. R. Civ. P. 17

ARTICLES

Ballard, *Riddle of the Lusitania,* National Geographic Magazine (April 1995)..... 8

Giesecke, *Shipwrecks: The Past in the Present,* 15 Coastal Management 179 (1987) 22

Edelman, *Who Gets Treasure Recovered From Sea?* N.Y.L.J., Dec. 4, 1992..... 22

TABLE OF AUTHORITIES--Continued

Page

TREATISES & MISCELLANEOUS

Robert D. Ballard, *Exploring the Lusitania* (1995) 3

T. Schoenbaum, *Admiralty and Maritime Law* (1987)..... 22

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1996

No. _____

F. Gregg Bemis, Jr.,
Petitioner
v.
The RMS LUSITANIA, etc.,
in rem,
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 17, 1996, is reproduced at page 1a of the Appendix to this Petition ("Pet. App.). The final amended judgment of the United States District Court for the Eastern District of Virginia, dated May 3,1995 is

reproduced at Pet. App. 13a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated October 16, 1996, is is reproduced at Pet. App.15a.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. Pet. App. 1a. The court of appeals denied a timely Petition for Rehearing on October 16, 1996. Pet. App. 15a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction...."

STATEMENT OF THE CASE

This action arises out of the sinking of the famous passenger liner RMS *Lusitania*. Built in 1907 to outperform record-holding German passenger liners, the *Lusitania* was the pride of the

Cunard Line. Her owner described her as a "floating palace." On the afternoon of May 7, 1915 during the early years of the Great War in Europe, the ship was struck by a single torpedo, fired from the German submarine U-20. In less than 12 minutes, she sank with over a thousand souls.[1]

Americans were outraged by the attack, which took the lives of 123 of their compatriots. The press called the sinking "deliberate murder," and some leaders, including former President Theodore Roosevelt, demanded reprisals against Germany. While almost two years would pass before President Wilson would ask Congress to declare war against the Axis Powers, the attack on the *Lusitania* was a crucial milestone credited with drawing the United States into the First World War.

Today, the once-majestic *Lusitania* lies at a depth of 290' in a confused, "ghostly wreckage." The ravages of time have added to the general entropy at the site and the commingling of items on the shipwreck. The former superstructure has slid off the starboard side onto the sand.

---

[1] Much of the history is outlined in a recent book by Petitioner's joint venture partner, Dr. Robert D. Ballard, who discovered the *Titanic* and the *Bismark*. *See generally* Roberd D. Ballard, *Exploring the Lusitania* (1995).

Bemis' Contracts for Title and Salvage Rights

Following the sinking, the loss was covered by Llyod's. Lloyd's, in turn, was paid off by the London & Liverpool War Risks Association (commonly known as the "War Reclamation Board"). The War Reclamation Board was an instrumentality established by the British Government to allow merchant shipping to continue during the war by providing comprehensive insurance coverage for war losses. Upon payment of the loss to Lloyd's, the War Reclamation Board acquired title, and was required to hold title to the wreck for at least 50 years prior to conveying title to a third party.

On March 2, 1967, the War Reclamation Board sold "the rights and interests in the wreck of the '*Lusitania*'" to John F. Light, and Light assumed "all liabilities and expenses which might attach to the wreck." That same year, Light conveyed his "salvage and other proprietary rights" in the wreck to Holt, Rhinehart and Winston, which later conveyed these to George Macomber and Gregg Bemis. Through assignments dated January 10, 1968, July 29, 1968 and several later instruments, Light conveyed "his entire right, title and interest in and to the wreck of the 'Lusitania' and its cargo" to George

Macomber, who, in turn, conveyed his entire title and interest to Petitioner Bemis.

The attorney who performed the title research and drafted the title instruments for Light and Macomber was William F. Andres, Esq. Andres initially handled Light's purchase of the shipwreck from the War Reclamation Board and later drafted the conveyances from Light to Macomber and Bemis. Andres had been a partner in the Boston law firm of Sherburne, Powers & Needham since 1940. Andres served on the board of directors of several national companies, an ivy league college and not-for-profit institutions. His standing at the bar was exemplary.

Andres determined that the chain of title conveyed the entire *Lusitania* shipwreck, including her contents and cargo.

Macomber and Bemis confirmed this, testifying in at trial that they acquired interests in the entire wreck, including the hull, tackle, cargo and passenger effects.

Salvage, Preservation and Scientific Activities by Bemis and His Predecessors In Interest

Despite the hazardous depth, strong current and poor visibility at the shipwreck site, Bemis' privies, and later Bemis himself, engaged in numerous salvage activities from the mid-1960s to the present. While initially these activities focused on recovering artifacts and photographing the wrecksite, in more recent years Bemis has concentrated on documenting and preserving the important scientific, historical and archaeological values of the shipwreck.

Beginning in the mid-1960s, John Light undertook a series of expeditions to the *Lusitania* for surveying, photographing and salvaging the shipwreck site. During the late 1960s and continuing into the 1970s, Light continued his activities with Macomber and later Bemis. Over a period of several years, the team of Light, Macomber and Bemis implemented a program for the fabrication and testing of a saturation diving complex for sustained surveying, photographing and recovery efforts at the shipwreck. During these early years alone, Macomber and Bemis spent approximately $900,000 on salvage activities at the *Lusitania* activities.

During the 1980s, Bemis entered into a subcontract with Oceaneering International. Oceaneering is an international subsea contractor and conglomerate with 1,500 employees in 24 countries, 70 deep diving systems, 30 atmospheric diving systems, 40 remotely operated vehicles and 20 survey systems and multi-purpose vessels. During the course of Oceaneering's efforts, dozens of items were recovered from the hull, tackel, apparel, cargo and passenger effects of the *Lusitania* shipwreck.

During the late 1980s and 1990s, Bemis' objectives with respect to the *Lusitania* adapted consistently with evolving social and legal views of the value of historic shipwrecks as a cultural and scientific resource. His program developed as its primary mission the protection and promotion of the intangible values of the shipwreck as a resource for information in the fields of history, archaeology and science. His goal included deliberately leaving artifacts on the shipwreck *in situ*, within their historical provenance. Bemis' efforts entailed substantial work analyzing the data collected during at-sea operations, historical research, magazine articles, films and books and preparations for further at-sea operations.

In June, 1993, Bemis entered into a joint venture with with the National Geographic Society and Dr. Robert P. Ballard for an expedition to explore and photograph the *Lusitania* that summer. The 1993 expedition used some of the most advanced technology in the world, was methodical and employed the services of experts in science, history and technology. The on-shore analysis of the extensive data generated is on-going and will continue for many years.

In the summer of 1994, a further expedition was undertaken at the shipwreck site. While truncated, the 1994 expedition, like the 1993 expedition, produced important data and information concerning the physical condition of the shipwreck site and photodocumentation of the site, consistent with Bemis' long-term goal of protecting the shipwreck's scientific, historical and educational values.

Since succeeding to title, Bemis has promoted major educational publications and events to disseminate the information gained during his programs for exploration of the shipwreck. Most recently, these efforts have included magazine articles, such as the "Riddle of the *Lusitania*," published by Dr. Ballard in the April, 1994 issue of *National Geographic Magazine*; international

television specials; a home video entitled *Last Voyage of the Lusitania*; and a plethora of other publications, lectures and museum exhibits.

Theft and Trespass to Bemis' Property

Bemis has faced difficulty obtaining voluntary respect for his ownership rights from others in the area. For example, despite their leader's ostensible recognition of Bemis' legal title to the shipwreck, a group of rogue American and British divers secretly made numerous dives to the shipwreck on at least 9 separate days during the summer of 1994. The divers pilfered historical artifacts from the shipwreck, including a brass porthole, two glass prisms, a deck prism frame, a porcelain soap dish and tiles – all owned by Bemis.

Proceedings Below

Bemis filed this *in rem* proceeding in the United States District Court for the Eastern District of Virginia to confirm his title to the shipwreck. He named as *in rem* defendant the *RMS Lusitania*, her engines, tackle, apparel, appurtenances, cargo, etc. Following a pre-arrest hearing, taking of evidence and briefing, the district court ordered the arrest of the defendant shipwreck and further ordered that any person claiming any interest in the *in rem* defendant

must file a claim under oath on pain of being barred of all relief The court ordered extensive publication service in major national and international press, together with personal service on certain individuals and institutions thought to be potential claimants of interests in the shipwreck..

No timely adverse claims of ownership were filed or sustained. At no time during these proceedings has the district court or the court of appeals recognized any adverse claim or defense of any claimant, other than the complaint for relief filed by Bemis.[2]

At trial, no person or party pleaded any matter or preserted any evidence rebutting Bemis' verified claim of title to the entire wreck of the *Lusitania*, including the hull, tackle, engines, apparel, appurtenances, cargo and other contents. No evidence was offered to refute any of Bemis' evidence on his property interest in the entire shipwreck, or to rebut the testimony of both Bemis

---

[2] The district court permitted the late filing of a claim by Muriel Light, the widow of John F. Light, who later during the proceedings assigned all her right, title and interest to Bemis, and whose claim was dismissed by the district court "agreed and with prejudice." Another claim was lodged by Fifty-Fathom Ventures, Inc. and upon notice and hearing, the district court denied filing and dismissed the claim. No appeal was taken by Fifty-Fathom.

and Macomber that they had aquired title in the entire shipwreck including cargo and passenger effects as well as hull, tackle, apparel and appurtenances. Nor was any proof forthcoming to rebut the title opinion to like effect of Sherburne, Powers and Needham.

Following trial, the district court issued its decision, tracing the chain of title from the original owners of the vessel to Bemis. The district court concluded that Bemis had established "an accurate and complete chain of title" to the *Lusitania's* "hull, tackle, apparel and appurtenances," and entered judgment confirming Bemis' title to these.

As to general cargo and passenger effects still on the shipwreck, the district court denied Bemis any rights, whatsoever. The district court declined to apply any presumption of unity of title to the Defendant *res*. Accordingly, it proceeded to give its interpretation of a letter of conveyance from the War Reclamation Board to Petitioner's predecessor-in-interest, John Light; the district court interpreted the letter as conveying title to the vessel but not the cargo and passenger effects.[3] Based on its Opinion,

---

[3] Based on its assumption that the language was unambiguous, the district court declined to apply the general custom and usage in British admiralty law that the conveyance to light of the "wreck" denoted transfer of the entire shipwreck, including all items of

the district court declined to confirm Bemis' title in the cargo and other contents.

Bemis appealed to the United States Court of Appeals for the Fourth Circuit. His appeal was limited to those portions of the Amended Judgment denying his interest in the cargo or other contents on the wreck of the *Lusitania* and denying protection from theft and looting of his property on the shipwreck.

The court of appeals upheld the district court's decision, which had divided the defendant *res* into "abandoned" and "unabandoned" portions, despite the absence of any claim contrary to Bemis' title. In so doing, the court of appeals failed to accord petitioner any presumption of unity of title.

The court of appeals rejected the district court's assumption that the War Reclamation Board's conveyance was unambiguous and could be interpreted only as a conveyance of an interest in the vessel. Rather, iit held that Bemis' interpretation--that the entire interest in the wreck, including cargo

---

whatever origin. The district court also considered "irrelevant" the subsequent usages and conveyances in the chain of title that were consistent with title to the cargo and other contents having previously vested in the War Reclamation Board.

and passenger effects, had been conveyed-- was "reasonable." In light of the rule in the Fourth Circuit against the presumption of unity of the *res*, however, the court of appeals affirmed based on the clearly erroneous rule.

REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address the significant legal and practical consequences of the opinion below. In denying Bemis property interests in the cargo and passenger effects despite the absence of an opposing assertion of property interest in the *in rem* proceeding, the opinion below the Opinion is in direct conflict with the rule of the United States Court of Appeals for the Ninth Circuit, which imposes a presumption in *in rem* proceedings that property interests in the defendant *res* are unified. By automatically dividing interests in the *res* into the hull, tackle, apparel and appurtenances, on the one hand, and contents, on the other-- despite the absence of any opposing interest at trial or proof rebutting the presumption of unity of interests in the *res* -- the rule in the Fourth Circuit invites stale and potentially fraudulent claims upon every maritime recovery of a valuable *res*. Given the importance of the *res* involved and the attention the *Lusitania* has received from the public and the admiralty

bar, the Court's action here is certain to have critical effects on the emerging industry of high technoology maritime recovery. The disposition of this case also has important implications for state and federal management of historic shipwrecks under statutes governing "abandoned" maritime proerty. This case is an appropriate vehicle for resolution of a nationally important maritime issue.

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE ADMIRALTY PRESUMPTION REGARDING THE UNITY OF PROPERTY INTERESTS IN *IN REM* PROCEEDINGS

A. The Federal Circuits Are In Direct Conflict As to the Presumption of Unity of Property Interests in a Defendant *Res*

The Opinion below is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Deep Sea Research, Inc. v. The Brother Johnathan*, 89 F.3rd 680 (9th Cir. 1996). There, the Court considered the competing claims of the State of California and a private salvor to another historic shipwreck, the Gold Rush steamer *Brother Johnathan*. The State of California urged

that, based upon the Fourth Circuit's earlier decision in *Columbus-America Discovery Group v. Atlantic Mutual Co.*, 974 F.2d 456 (4th Cir. 1992), the *in rem* plaintiff (the salvor) was entitled to only that portion of the *Brother Johnathan* as to which it could show original ownership.

The Ninth Circuit declined the State's request to divide the defendant *res* into "abandoned" and "unabandoned" portions. *Id.* at 689. Noting that doing so would likely be contrary to Congress' intent under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.* the Court also expressly rejected the Fourth Circuit's approach to the *in rem* presumption and pointed out the clear conflict:

> Second, such an approach is inconsistent with the general rule in maritime law of treating wrecks as a legally unified res. In fact, the Fourth Circuit's decision in Columbus-America appears to be the only admiralty case in which a wreck has been treated as a legally unified whole.

Id. at 689-90. Since, no original owner had appeared to claim ownership adverse to the plaintiff, the court of appeals found that the

shipwreck should be treated as owned in its entirety. *Id.*

In contrast to the presumption against unity of interest applied in the Fourth Circuit, the rule in the Ninth Circuit is the logical extension of the Court's analysis of the *in rem* presumption in *The Mary*, 13 U.S. (9 Cranch) 126 (1815). There, despite the overwhelming evidence that the facts were contrary, the Court held that because no opposing claim to the vessel had been filed in the *in rem* proceeding, the district court had no choice but to enter judgment for the plaintiff as a matter of law:

> The whole subject formed but one cause, and the whole came together before the same judge. By the rules of the Court, the condemnation of the vessel was inevitable; not because she was British property, but because the fact was charged and not repelled by the owner, he having failed to appear and to put in his claim

Id. at 142-43. (first and third emphasis added, second supplied).

The Ninth Circuit's application of the presumption of unity of interests in the defendant *res* follows from the instrinsic character of *in rem*

actions, which are designed to adjudicate rights in specific property as against all of the world, and the whole world, it is said, are parties to an admiralty cause. *Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303 (1915). The core issue in such proceedings is whether the plaintiff, or instead some other person has rights superior to anyone else in the entire world.

For this reason, a plaintiff files an *in rem* proceeding in order to force anyone claiming superior title or conflicting rights to make their claims known in the proceeding, so that the plaintiff will have the opportunity to confront and cross examine them. An *in rem* proceeding is a concursus, requiring that anyone claiming an interest in the *res* appear and either (i) assert their claim or (ii) defend against the claim of the plaintiff. See Rule (C)(4) of the Supplemental Rules for Certain Admiralty and Maritime The purpose of *in rem* proceedings is to determine finally all competing claims in the *res*, and "'all persons, including unknown claimants, may appear and be heard....'" Advisory Committtee note on Supplemental Rule C(4), Fed. R. Civ. P.

In Bemis' *in rem* action, the defendant is the *Lusitania* her engines, tackle, apparel, appurtenances, cargo, etc. In his verified

complaint, Bemis affirmatively averred his title to the entire property interests in the shipwreck. No person has come forward and filed a timely adverse claim or defense. As a matter of law, under the presumption applied in the Ninth Circuit, Bemis was entitled to confirmation of superior title to all unclaimed items on the shipwreck, including the cargo and contents of the shipwreck.

In conflict with the Ninth Circuit, however, the Opinion below follows the Fourth Circuit's earlier opinion in *Columbus-America*, 974 F.2d at 465 and carves up the historic shipwreck *Lusitania* into one "owned" portion representing Bemis' interest (the hull, tackle, apparel and appurtenaces) and another, "abandoned" portion (consisting of cargo and passenger effects).

The Opinion below thus breaks with the U.S. Court of Appeals for the Ninth Circuit concerning the presumptions that apply in determining property interests in *in rem* proceedings. In contrast to the Fourth Circuit, the Ninth Circuit has presumed the unity of property interests in the defendant *res* absent proof to the contrary, placing the burden of peading and proof on a claimant to come forward and demonstrate a disunity of interests.

B. This Is an Appropriate Case in Which to Resolve the Conflict and Provide Guidance on the Presumption of Unity of Property Interests in Admiralty Proceedings *In Rem*

This case provides an appropriate vehicle for the Court to provide guidelines on the admiralty law applicable to the *in rem* presumption. The conflict among the circuits is plain, and the Ninth Circuit has openly acknolwedged this conflict.

The issues presented by this petition are purely legal. The facts are not complex. The outcome of the Opinion below turns on the very question as to which the conflict exists. Had the court of apppeals followed the rule in the Ninth Circuit, a decision for Bemis would have been compelled as a matter of law, since no opposing claimant appeared to plead or prove a disunity of interests in the *res*.

Only this Court is capable of resolving the conflict. This is consistent with the Court's constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *E.g. Miles v.*

Apex Marine Corp., 111 S. Ct. 317, 322-32 (1990); *Moragne v. States Marine Lines, Inc.* 398 U.S. 375, 401 (1970). That uniformity is threatened by the conflict created by the opinion below. A conflict among the admiralty courts is even more intolerable in the context of shipwreck recovery, where venue is proper in any district where the recoverd property may be brought upon recovery, giving every incentive for forum shoppping. *See,* 28 U.S.C. §1333; *Treasure Salvors v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981). The Court should grant certiorari to resolve the conflict and provide guidance to the lower courts.

C. The Court Should Consolidate Consideration of this Matter With the Petition Filed by the State of California in *Deep Sea Research, Inc. v. The Brother Johnathan.*

The issue presented by this petition is identical to an issue that will be presented by The State of California in its petition for certiorari in *Deep Sea Research, Inc. v. The Brother Johnathan*, 89 F.3rd 680 (9th Cir. 1996). The facts in that case are also well-developed, the record is clear and resolution of the State's

petition will turn on the question presented in the instant petition. Consideration of the instant petition in conjunction with the State of California's petition will help sharpen the focus of these proceedings and serve the interests of consistency in clarifying the rule that should be applied by the federal circuits.

II. NEW ADVANCES IN MARINE TECHNOLOGY HAVE MULTIPLIED CONFLICTS OVER PROPERTY INTERESTS IN *IN REM* PROCEEDINGS, REQUIRING THIS COURT'S EXERCISE OF ITS CONSTITUTIONAL ROLE IN FASHIONING THE DEVELOPMENT OF MARITIME AND INTERNATIONAL LAW

The Court's resolution of conflicts is especially important in the admiralty context. "The issue is one of importance in the development of the law maritime, as to which [which the Supreme Court has] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

The divergence in the approaches of maritime courts to adjudicating claims *in rem* proceedings is plain. *Compare* Pet. App. 1a (dividing up property interests in defendant *res* despite absence of

opposing claim of interest) *with The Brother Johnathan* 89 F.3d at 689-90 (treating defendant *res* as a unified whole). *See* T. Schoenbaum, *Admiralty and Maritime Law* 513 (1987) "cases are in conflict on several points" in approaching long-lost wrecks); Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J. Dec. 4,1 992, at 3, 4, (discussing change in law effected by Fourth Circuit concluding need for resolution by the Supreme Court of "What proof is needed to show presumptions regarding property interests?").

The development of new maritime technology has made conflict among ancient admiralty law doctrines inevitable. With the development of ever-more sophisticated technologies for exploring the ocean, valuable items long thought hopelessly lost may be recovered, making the determination of presumptions regarding property interests an issue of growing significance.

Although the Federal Government's public policy strongly encourages deep sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technologies, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have

the opportunity to participate in such exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation - Background Preservation - Background Paper*, OTA-BP-E-37, 8 (1987).

Under the presumption of unity of title, risks are balanced against the certainty of predictability that title will vest in an explorer who succeeds in locating and possessing ancient artifacts on the seabed. The Opinion below, however, provides an open invitation to highly speculative and fabricated claims. Only after incurring the expense of bringing articles to the surface will deep sea explorers know how much risk, including the riks of an adverse claim to title, is involved. The risk is particularly acute as to historic shipwrecks, where much time has often passed and substantial sums may be at stake.[4] For this reason, the court of appeals' rule

---

4 For this reason, the court of appeals; rule provides maritime explorers with an unfortunate disincentive to perform recovery in an archaeologically responsible manner. Through recovery in sophisticated marine technologies, shipwrecks can yield information not only from their cargoes, but also from their structures and the utensils, plates, glassware, but also from their structures and utensils, plates, glassware, cutlery and clothing found aboard historic shipwrecks. Giesecke, *Shipwreck: The Past in the Present, 15 Coastal Management 179, 180 (1987).* Ironically, under Fourth Circuit's approach, the historical context and archaeological provenance of such information may be lost by

provides maritime explorers and entrepreneurs with an unfortunate disincentive to invest sufficient resources in deep sea recovery projects.

Application of the presumption of unity of property interests would achieve certainty and finality in the laws by allowing title to property in the seabed to be effectively quieted by *in rem* proceedings and by disfavoring purported claimants who intervene in proceedings to quiet title but are unable to support their claims with reliable evidence. The opinion below, in contrast, by applying a presumption of disunity of property interests, leaves admiralty courts in future cases with the Herculean task of sorting out such puffed up claims.

---

failing to grant a presumption of unity in property interests, absent pleading and proof to the contrary.

III. THE COURT OF APPEALS' RULE WILL CONTINUE TO SPAWN CONFUSION IN THE LAW GOVERNING PUBLIC ADMINISTRATION OF *IN REM* PROCEEDINGS AND HISTORIC SHIPWRECKS

The uncertainty over legal requirements for presumptions regarding property interests that arises from the opinion below has important implications for the law governing management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in 1988* U.S.C.C.A.N. 365. Congress and the States have accordingly passed legislation aimed at protecting these historic resources. The federal-state jurisdictional conflict that inherently results from the rule applied in the Fourth Circuit, however, places the practicable administration of such federal and state legislation in doubt and makes conflicts of jurisdiction inevitable between federal and state courts..

The major federal statute on point is Abandoned Shipwreck Act of 1987, 43 U.S.C. §2101-2106 ("ASA"). Under the ASA, the United

States asserted title to "any abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, but transferred title of most shipwrecks to the State on whose submerged land they are located. 43 U.S.C. §2105. States are encouraged under the ASA to take steps to protect abandoned shipwrecks for recreational and historical purposes. 43 U.S.C. §2104.

Under the rule in the Fourth Circuit, there is no presumption of unitary property interests in such shipwrecks. Instead, shipwrecks are presumed divided into "abandoned" and "unabandoned" portions, and the claim of anyone who appears to assert an interest is instead preserved.

In rejecting the Fourth Circuit's rule, the Ninth Circuit has observed the clash of federal-state jurisdiction inherent in the Fourth Circuit's approach:

> First, if we were to find that the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the Brother Jonathan. It is unlikely that Congress

intended such a confusing and inefficient approach in adopting the ASA.

Deep Sea Research, Inc. v. The Brother Johnathan, 89 F.3rd at 689.

The rule in the Fourth Circuit has the potential of removing from the coverage of the ASA's protection any number of shipwrecks that would previously have been considered abandoned. Many states have statutes similarly aimed at protecting historic shipwrecks, most of which define their coverage in terms of presumptions regarding property interests. *See* H.R. Rep. No. 514 (I) at 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366 (listing statutes).

The conflict among the circuits over the proper presumption in *in rem* proceeding thus has important implications for the laws governing the management of maritime resources by the Federal Government and the states. This split among the circuits also has significant implications for the distribution of jurisdiction between the state and federal courts, as well as the future ability of non-governmental institututions to participate in the benefits and innovations of high-tech exploration of the deep ocean.

The approach of the opinion below burdens admiralty courts with the difficult task of dividing up historic shipwrecks based on claims given ageless vitality by its rule against quieting title in *in rem* actions and its presumption against the unity of property interests in the defendant *res*. The Court's attention to the issue is warranted now to avoid further confusion in the area.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

Richard T. Robol
Counsel of Record
Huff, Poole & Mahoney
4785 Columbus Street
Virginia Beach, Virginia
23462-6749
(757) 499-1841

APPENDICES

APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED SEPTEMBER 17, 1996

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2057

F. GREGG BEMIS, JR.,
Plaintiff-Appellant,

v.

THE RMS LUSITANIA, her engines, tackle, apparel, appurtenances, cargo, etc., in rem,
Defendant- Appellee

and

Muriel C. Light, Fifty Fathom Ventures, Incorporated,
Claimants

Apeal from the United States District Court for the Eastern District of Virginia, at Norfolk
J. Calvitt Clarke, Jr., Senior District Judge.
(CA-94-226)

Submitted: August 30, 1996

Decided: September 17, 1996

Before HAMILTON, MICHAEL, AND MOTZ, Circuit Judges

COUNSEL

Richard T. Robol, HUFF, POOLE & MAHONEY, Virginia Beach, Virginia, for Appellant

OPINION

PER CURIAM:

F. Gregg Bemis. filed this in rem action seeking a declaration that he is the sole owner of the wreck of the RMS Lusitania. The district court determined that Bemis is indeed the owner of the ship's hull, tackle, engines and appurtenances, but it declined to award him ownership or a salvage award for the contents of the ship, including the cargo and the passengers' possessions. Finding no error in the district court's decision, we affirm

I

The hull of the Lusitania rests on the ocean floor off the coast of Ireland, where it was sunk by a torpedo fired by a German Imperial Navy U-Boat in 1915. The wreck is. below 295 feet of water, in an area with a strong current and low visibility, making efforts to salvage the contents of the ship extremely difficult.

Bemis seeks to salvage the contrents of the Lusitania. He obtained title to the hull of the ship through a series of transfers from the ship's original owner. Cunard Steamship Company ("Cunard), the Liverpool and London War Risks Insurance Association, also known as the War Reclamations Board ("Liverpool"). and various private parties who have owncd interests in the

ship over the last seventy years.[1] Bemis has participated in three expeditions to the Lusitania since 1982; on those expeditions, he has photographed the ship, placed a plaque on the hull, and conducted salvage operations, attempting to recover the cargo and passengers' personal effects from the ship. The title to the contents of the ship (both cargo and passsengers' personal effects), and the right to salvage those contents, are at the heart of the action before this Court. Bemis advances several theories in suppot of his claim to the contents of the ship.

---

[1] Bemis was one of three private owners of the Lusitania. One of the other owners, George Macomber, transferred all of his interest in the ship to Bemis over the course of several years with the final convyeance in 1993. The other private owner, John Light, is deceased. His widow, Muriel Light, opposed Bemis's claim in the district corut, but Bemis and Mrs. Light reached a settlement agreement in 1995, whereby she assigned all her interest in the ship to Bemis.

II

First, Bemis contends that Cunard transfered the cargo and passengers' personal effects to Livepool, who paid the insurance carrier when the ship sank, and that his entitlement to the contents followed the chain-of- title to the ship.[2] Although the district court agreed that Bemis had title to the ship, it rejected his claim to the contents on the chain of title argument.

Bemis presented no direct evidence regarding the transfer from Cunard to Liverpool. If Liverpool paid Cunard, the passengers, and the cargo owners for the contents of the ship, the possessions and cargo would have been Liverpool's to transfer to Light, and Light's to transfer to Macomber and Bemis. However, the record contains no evidence that such claims were actually paid by Liverpool.

Bemis contends that William Andres, the attorney who had handled the conveyance from Liverpool to Light, and the later conveyance from Light to Macomber and Bemis, believed that title to

---

[2] Bemis also contended that he obtained title to the contents through later conveyances. However, as the district court noted, if Cunard did not convey title to the contents to Liverpool, no later conveyance could have carried title to the contents.

the contents of the ship were part of the covneyance. Bemis offered his own statements, Macomber's testimony and the statements of Andres's former associate, Thomas Swain, regarding their understanding of the title transfer.

Bemis relies heavily of a lettter from the Liverpool to Light, which provides in relevant Part:

> [T]he Association [Liverpool] paid a total loss claim to the Owners and the rights and interests in the vessel passed to the Association.
>
> ***
>
> [T]he Association has sold to you the rights and interests in the wreck of the "Lusitania" on the undersanding that it will not be salved as a whole, repaired and put into commission again, and also that the purchaser takes over all liabilities and expenses which might attach to the wreck.

Bemis places great weight on the use of the term "wreck" in the Liverpool letter because, under English law, a wreck includes both the hull of a sunken ship and its contents. John A. Edington, *3 Benedict on Admiralty* Sec. 133 (7th e.d 1993 &

Supp. 1996). The district court, however, found that the use of the term wreck was not dispositive, and the the word "vessel" in the conveyance language was determinative; a "vessel" is, in English law, the hull of a sunken ship, excluding its contents. *See generally 3A Benedict on Admiralty* Sec. 205-09.

Both interpretations of the letter are reasonable. However, in the absence of evidence about Liverpool's agreement with Cunard, the district court did not err in concluding that Liverpool transferred only the hull, tackle, and appurtenances of the ship to Light.

III

Bemis next asserts that the decision in *Pierce v. Bemis: The Lusitania*, 1 Q.B. 40] (1986) confirms his title to the contents. The issue in *Pierce* was whether the British Crown was entitled to artifacts that Bemis and other claimants brought up in a 1982 diving expedition. The court concluded that Bemis and his then-partners had title to the hull, and that the Crown did not have title to the contents of the ship. Further, the court held that Bemis was the owner of the salvaged artifacts by virtue of possessory title. The English court did not, however, determine ownership of the contents that were still on board the ship. As

the district court recognized, the English court's decision was not dispositive as to the title of the contents still on board the ship. Further, the district court properly concluded, under the same reasoning as that in the *Pierce* decision, that Bemis was the owner of the artifacts recovered in the 1993 and 1994 dives.

IV

Bemis only has a claim on the contents still on board the ship if he can establish that the contents were abandoned and he is entitled to relief through the law of finds or the law of salvage. The law of finds expresses "the ancient and honorable principle of 'finders, keepers.'" *Martha's Vineyard Scuba HQ, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). It applies to findings of sunken property abandoned by prior owners. *CADG 1*, 974 F.2d at 464. A vessel may be considered abandoned if no owner comes forward to claim it during an action to claim ownership rights. *Id.* at 461. However, some overt act expressing an intent to abandon is also required. *Id.* A person can be deemed the owner of abandoned property if he takes possession of it and exercises dominion or control

over it. *Moyer v. Wrecked & Abandoned Vessel, Known as Andrea Doria*, 836 F.Supp. 1099, 1106 (D.N.J. 1993). The mere discovery of an abandoned vessel is not sufficient to establish possession. *Id.*

The district court found that the contents of the Lusitania were abandoned because no one, including the Lusitania's passengers or their descendants, has come forward to file a claim since Bemis commenced this action. *CADG 1*, 974 F.2d at 465. However, the court found that Bemis has only taken possession of the items he salvaged for the ship during his past diving expeditions.

Bemis does not have dominion and control over the remaining contents of the ship because they are still submerged in the hull at the bottom of the ocean, and he does not have a "high degree of control" over the contents. *CADG 1*, 974 F.2d at 460 (quoting *Hener v. United States*, 525 F.Supp. 350, 356 (S.D.N.Y. 1981)). Further, he is not conducting an ongoing salvage operation, another ground for determining that a salvor has dominion and control over cargo of a shipwreck. *Hener*, 525 F.Supp. at 355; *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 546 F.Supp. 919, 926 (S.D. Fl. 1981);

Eads v. Brazelton, 22 Ark. 499, 511 (1861). A salvor does not obtain title simply by discovery of lost or abandoned property; transitory presence is not sufficient to establish control. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560,571 (5th Cir. 1981) (citing *Brady v. S.S. African Queen*, 179 F.Supp. 321 (E.D. Va 1960)).

Bemis has gone on three expeditions to the Lusitania, one each in 1982, 1993 and 1994[3]. During these trips he took numerous photographs of the wreck and recovered ninety four artifacts on the first expedition.[4] We find that Bemis's results

---

[3] The 1993 dive was primarily for the purpose of researching an article for *National Geographic* maagazine. Bemis's cooperation with the author of the article, Dr. Robert Ballard, was conditioned in part on his ability to accompany Ballard on the trip. According to Ballard, Bemis was coooperative in the 1993 expedition "in that he did not obstruct or in any way try to affect or alter our operational plan that we had submitted to him."

[4] Bemis contends that the district court should have considered the expeditions of Macomber, Light, and others even though Bemis did not personally participate in those operations. Bemis is correct in stating that he need not personally participate in salvage operations for those operations attributed to him. He contends that Light and Macomber transferred to him any rights they acquired as a result of their salvage operations in the 1960s and 1970s. However, as the district court noted, Bemis conducted only three expeditions since 1982. Even if Light and

to date do not amount to a showing of actual or constructive possession of the ship's still-submerged contents sufficient to declare him the owner of those contents. *See 3A Benedict on Amiralty* Sec. 158. However, as noted above, the district court correctly determined that Bemis is the owner of each of the items he has actually recovered from the ship.

V

Bemis also sought a liberal salvage award and an injunction permitting him the sole right to conduct salvage operations. A salvor is entitled to compensation for recovery of the property; he is not generally awarded title to the property. *CADG 1*, 974 F.2d at 459.

To obtain a salvage award, a claimant must establish three elements. First, the property must be in marine peril; underwater shipwrecks are usually considered in marine peril because of the risk of loss. *Treasure Salvors, Inc. v.*

Macomber's actions somehow vested in Bemis, the district court could fairly have concluded that Bemis's relative inaction over the past 14 years was determinative.

Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 336-37 (5th Cir. 1978); 3A *Benedict on Admiralty* § 63. Next, the salvage service must be voluntary. 3A *Benedict on Admiralty* §§ 15, 23, 68. Third, the salvage must be successful, in whole or in part. *Id.* at § 88. In addition, a salvor must establish possession of the property. *Hener*, 525 F.Supp. at 357. In the alternative, the salvor must show that he has acted with due diligence and that his salvage operations are ongoing. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d at 567; *Andrea Doria*, 836 F.Supp. at 1107. A salvor "'must have the intention and capacity to save the property involved, but the [salvor] need not have the intention to acquire it.'" *CADG 1*, 974 F.2d at 460 (quoting *Hener*, 525 F.Supp. at 357-58).

The district court correctly found that Bemis was not entitled to a salvage award Although the contents of the Lusitania are in marine peril and Bemis is performing salvage operations voluntarily, the court concluded that Bemis had not had enough success to warrant a salvage award. "'It is not what salvors offer or attempt to do that entitles them to compensation, but what they succeed in doing to the benefit of the property.'" 3A *Benedict on Admiralty* § 89

(quoting *Curry v. The Loch Goil*, 6 F. Cas. 995 (S.D. Fl. 1877) (No. 3495)). Bemis has expended significant resources in his attempts to salvage the Lusitania's cargo; however, he has retrieved very few artifacts from the shipwreck.

Further, Bemis's three expeditions over thirteen years did not constitute due diligence. Although Bemis recovered many artifacts in his 1982 dive, the 1993 dive was run primarily by the National Geographic Society as a phtographic expedition. The 1994 dive was unsuccessful; the expedition lasted only two days instead of the planned two weeks, and no artifacts were recovered. These facts fully support the district court's conclusion that Bemis does not have an "ongoing" operation, and that his chance of further success is slim.

Bemis contends finally that he should be given a salvage award and an injunction preventing other divers from taking artifacts from the ship because of the scientific, historical, and anthropological significance of the wreck.[5] *See*

---

[5] Bemis' argument in this regard is somewhat disingenuous. He relies largely on the deposition testimony of Dr. Robert Ballard, an oceanographer with whom he travelled to the Lusitania in 1993. Dr. Ballard stated that he is "opposed to the recovery of artifacts" from historic shipwrecks. However, Bemis testified

Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 546 F. Supp. at 927-28. The historical, scientific and archaeological value of a shipwreck is a "significant element" in the district court's consideration of a claim for an exclusive salvage award. *CADG I*, 974 F.2d at 468 n.9. As the district court recognized, Bemis has conducted several expeditions to the ship. However, his expeditions have been sporadic and not highly successful.[6] "It matters not how arduously or skillfully the salvors may have labored . . . salvage remuneration is dependent upon the property's being saved." 3A *Benedict on Admiralty* § 88. Because Bemis has not participated in sustained, successful salvage operations, the court properly found that an exclusive salvage award was not warranted.

Most troubling is Bemis's contention that "rogue" divers are exploring the shipwreck and taking artifacts to which they are not entitled. One group of divers, known as Fifty Fathom Ventures, took several items from the wreck; upon the

---

that he wishes to bring artifacts up from the wreck to create a travelling exhibition for museums.

[6] As the district court noted, much of the photography and research which resulted in the *National Geographic* article is attributable to Dr. Ballard, not to Bemis.

district court's order, these items have been turned over to Bemis, who now has title to them.

Another group of divers, led by British diver Polly Tapson, planned a 1994 dive to the wreck.[7] Bemis submitted as evidence a letter from Tapson to the other divers in her group, stating that their dive would have to be surreptitious because Bemis had not approved it. She referred to the divers' being able to "send up anything we want to from the Lusitania," and said that "[t]he Irish we met seemed a bit funny about us taking anything from the wreck," but would "turn a blind eye rather than risk losing the [group's] charter." She also said that the group's "wreck robbing instincts might have to be a tiny bit restrained." Bemis contends, perhaps correctly, that unless he is awarded an injunction, other divers will take artifacts from the ship. Although the loss of artifacts would be unfortunate, Bemis simply has no right to the injunction absent an ownership interest in the contents of the ship, and he has not established such an interest. Consequently, we find that the district court did not err in declining to issue the injunction

---

[7] The record does not clearly reflect whether the dive actually took place.

We affirm the district court's decision. We deny Bemis' motion to expedite as moot.

AFFIRMED.

APPENDIX B- AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED MAY 3, 1995

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA
Norfolk Division

Civil Action No. 2:94cv226

F. GREGG BEMIS, JR.,
Plaintiff

v.

THE RMS LUSITANIA, her engines, tackle, apparel, appurtenances, cargo, etc., in rem,
Defendant

AMENDED JUDGMENT

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Bemis has established an accurate and complete chain of title to the RMS LUSITANIA, her hull, tackle and appurtenances as well as her engines and apparel and Bemis' title to these is hereby confirmed.

IT IS ORDERED AND ADJUDGED that the cargo and personal effects of passengers and crew that have been salvaged from past expeditions had been abandoned and, pursuant to the law of finds, lawful title to such contents now vests those who salvaged them.

IT IS FURTHER ORDERED AND ADJUDGED hat the Court denies the claim of Bemis to title to the still submerged cargo and personal effects of the passengers and crew based on conveyance or the law of finds. Further, the Court denies Bemis' request for exclusive future salvage rights to personal effects of passengers and crew to cargo.

IT IS FURTHER ORDERED that the artifacts previously salvaged by Fifty Fathom Ventures and heretofore ordered to be placed in the custody of the U.S. Marshal shall be turned over to Bemis as they had been a part of the vessel itself and Bemis' title to these is hereby confirmed.

APPENDIX C- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED OCTOBER 16, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
October 16, 1996

No. 95-2057
CA-94-226

F. GREGG BEMIS, JR.,
Plaintiff-Appellant,

v.

THE RMS LUSITANIA, her engines, tackle, apparel, appurtenances, cargo, etc., in rem,
Defendant- Appellee

and

Muriel C. Light, Fifty Fathom Ventures, Incoroporated,
Claimants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or of the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.